

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT O. GILMORE, JR.,

Appellant,

, vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA, et al.,

Appellee.

No. 22478

APPELLEE'S BRIEF

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TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
A. <u>Proceedings in State Courts</u>	1
B. <u>Proceedings in the Federal Courts</u>	3
APPELLANT'S CONTENTIONS	4
SUMMARY OF APPELLEE'S ARGUMENT	4
<u>ARGUMENT</u>	
I. THE DISTRICT COURT FINDING THAT APPELLANT ENTERED HIS PLEA OF GUILT THROUGH NO DECEPTION OF HIS TRIAL ATTORNEY SHOULD NOT BE DISTURBED ON THIS APPEAL.	5
II. APPELLANT'S REMAINING ALLEGATIONS ARE WITHOUT MERIT AND ARE NOT PROPERLY BEFORE THE COURT.	8
CONCLUSION	10

TABLE OF CASES

	<u>Page</u>
Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964)	8
Gilmore v. California, 364 F.2d 916 (9th Cir. 1966)	8, 10
People v. Reeves, 64 Cal.2d 766 (1966)	9
Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941), cert. den. 314 U.S. 675	8
Robinson v. United States, 264 F.Supp. 146 (W.D. Ky. 1967)	9
Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965), cert. den. 382 U.S. 866	8
Rose v. Dickson, 327 F.2d 27 (1964)	10
Schiers v. California, 333 F.2d 173 (9th Cir. 1964)	10
United States v. Jackson, 262 F.Supp. 716 (D. Conn. 1967)	9

STATUTES AND AUTHORITIES

California Penal Code § 209	8, 9
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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause is issued.

STATEMENT OF THE CASE

A. Proceedings in State Courts

On July 18, 1961, appellant Robert O. Gilmore, Jr., was convicted in the Superior Court of Los Angeles County

upon his plea of guilty while represented by privately retained counsel, of the felony offenses of rape and first degree robbery in violation of California Penal Code sections 261.3 and 211, respectively. He was sentenced on the same date to imprisonment in the State Prison for the term prescribed by law (CT 83).

Appellant did not appeal the above conviction. Rather, approximately three years later he filed a petition for a writ of habeas corpus in the Superior Court of Monterey. That petition was denied without hearing on October 23, 1964. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court which also was denied without hearing on May 12, 1965. Substantially the same factual and legal issues presented to the court below were raised in those petitions.

On February 6, 1967, appellant filed a petition for writ of habeas corpus in the Superior Court of Marin County. This petition was denied without opinion on February 7, 1967. In this petition appellant challenged the propriety of certain actions by the California Adult Authority. On February 24, 1967, appellant, asserting the same contentions that he had urged in his petition before the Superior Court of

Marin County, filed a petition for a writ of habeas corpus in the Supreme Court of California. This petition was denied March 8, 1967.

B. Proceedings in the Federal Courts

On June 18, 1965, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT, Vol. 1, 2-43). An Order to Show Cause was issued by Judge Wollenberg of that court on that same date (CT, Vol. 1, 44), and on July 22, 1965, appellee filed a return to the Order to Show Cause (CT, Vol. 1, 28-83).

On August 18, 1965, the District Court issued an Order Discharging the Order to Show Cause and denying appellant's petition (CT, Vol. 1, 166-168). A timely notice of appeal was filed by appellant on August 26, 1965 (CT, Vol. 1, 169-181). On September 1, 1965, an order was issued by Judge Wollenberg granting appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis (CT, Vol. 1, 190). This Court reversed and remanded the case for determination of whether appellant's trial attorney deceived appellant into entering a plea of guilty. Gilmore v. California, 364 F.2d 916 (9th Cir. 1966).

An evidentiary hearing was held in the Federal District Court on April 27, 1967 (CT, Vol. II, 3-63). On October 27, 1967, Judge Wollenberg issued an order denying appellant's petition for writ of habeas corpus (CT, Vol. 1, 276-281). On November 27, 1967, an order granting appellant's application for a certificate of probable cause was issued and appellant was allowed to appeal in forma pauperis (CT, Vol. 1, 314).

APPELLANT'S CONTENTIONS

1. Appellant's pleas of guilt were the result of unlawful coercion.

2. California's kidnapping statute is unconstitutional.

SUMMARY OF APPELLEE'S ARGUMENT

1. The District Court finding that appellant entered his plea of guilt through no deception of his trial attorney should not be disturbed on this appeal.

2. Appellant's remaining allegations are not properly before the court and are without merit.

ARGUMENT

I

THE DISTRICT COURT FINDING THAT
APPELLANT ENTERED HIS PLEA OF
GUILT THROUGH NO DECEPTION OF HIS
TRIAL ATTORNEY SHOULD NOT BE
DISTURBED ON THIS APPEAL.

At the evidentiary hearing appellant's trial attorney, Gladys Toolles Root, testified that she had told appellant that she had been successful in reaching a compromise with the Deputy District Attorney. The compromise was to the effect that if appellant would plead guilty to the charge of first degree robbery and to the charge of rape, then he would not be charged with two attempted robberies, simple kidnapping, and kidnapping for the purpose of robbery (CT, Vol. II, 53). Mrs. Root further testified that she explained to appellant that the amended information which would contain the robbery and rape counts would involve the same complaining witness (CT, Vol. II, 53). Mrs. Root also testified that she had discussed the full nature of the charges against appellant and went over each amendment of the information with him (CT, Vol. II 60-61).

Prior to the compromise the District Attorney's Office was seeking the death penalty. This fact, coupled

with her opinion that a conviction would be inevitable, led Mrs. Root to advise appellant to plead guilty (CT Vol. II, 54-56). Appellant accepted this advice. At no time, Mrs. Root testified, did she threaten to withdraw if appellant refused to plead guilty or did she promise him with a county jail sentence (CT Vol. II 52, 54).

Appellant contradicted Mrs. Root's testimony. However, the District Court, stating as follows, chose to believe her;

"Petitioner's main contention and the question left open by the Court of Appeals for this Court to decide, is whether a 'deal' had been made between the judge, the district attorney, and petitioner's counsel that if he pleaded guilty to the rape and robbery charges, he would receive only one year in the county jail. This Court is of the opinion that no 'deal' as alleged by petitioner was ever made. The only 'deal' that was made was for petitioner to plead guilty to two of the seven counts of the second amended information in return for a dismissal of the remaining five counts, two of which involved kidnapping offenses. In fact, this is what occurred, and the Court of Appeals

has already stated that there is no element of coercion in this situation. Gilmore v. People, supra, at p. 918.

"Mrs. Root, his attorney, denied that any such deal as testified to by petitioner was ever made. Petitioner must have been fully aware that no 'deal' had been made regarding the possibility of a one year county jail sentence as is shown by the transcript of proceedings wherein petitioner pleaded guilty and was thereafter sentenced to the state prison. (Respondent's Exhibit B, introduced into evidence at the hearing). Petitioner waived his right to have a probation report and agreed to be sentenced immediately following his plea. At this time, the Court advised him that he would be sentenced to the state prison, that the law provided a penitentiary sentence. It seems incredible that if, as petitioner alleges, there was in fact a 'deal', that he did not state anything at the time sentence was imposed. His testimony at the hearing herein was that he had been involved in other criminal proceedings. It

would seem, then, that he would know the difference between a county jail term and a state prison or penitentiary term."

(CT 279-280).

This finding of the District Court, supported as it is by substantial evidence, is binding on this Court. Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965) cert. den. 382 U.S. 866; Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941), cert. den. 314 U.S. 675.

II

APPELLANT'S REMAINING ALLEGATIONS
ARE WITHOUT MERIT AND ARE NOT
PROPERLY BEFORE THE COURT.

Although this Court reversed the District Court's order for the limited purpose of holding an evidentiary hearing to determine whether appellant was deceived by his trial attorney (Gilmore v. California, 364 F.2d 916 (1966)), appellant has raised additional issues in his post hearing brief and in his brief on appeal. Accordingly, respondent submits that these issues are not properly before the court. Nevertheless, the new arguments are without merit.

Appellant questions the constitutionality of California's kidnapping statute (Cal. Pen. Code

§ 209) in light of United States v. Jackson, 262 F. Supp. 716 (D. Conn. 1967) where it was held that the federal kidnapping statute (Title 18 U.S.C. § 1201 (a)) denied a defendant his right to a jury trial. The reasoning of Jackson is that since under federal law in a conviction of kidnapping by the court a death sentence could not be imposed whereas in a jury trial it could, a defendant was unconstitutionally coerced into accepting a court trial. Aside from the fact that Jackson has been questioned, (See, Robinson v. United States, 264 F.Supp. 146 (W.D. Ky. 1967)), as the District Court properly noted, Jackson does not apply in California, for when a defendant enters a plea of guilt to a kidnapping charge, the court can impose a death sentence. People v. Reeves, 64 Cal.2d 766 (1966). Also, as the District Court pointed out, the petitioner did not plead guilty to the kidnapping charge. That charge was dismissed after he pled guilty to the robbery and rape charges.

Appellant in his brief filed in this appeal for the first time questions the adequacy of his trial counsel. Mrs. Root testified that she investigated all aspects of the case and advised appellant to accept a compromise which she considered a satisfactory

alternative to the death penalty (CT Vol. II 54-56, 60-61). That Mrs. Root was successful in obtaining an amended indictment which contained only two counts rather than six, one of which carried the death penalty, is most indicative of the fact that appellant's representation was no sham or mockery of justice.

Appellant has not presented the question of the constitutionality of California's kidnapping statute or the adequacy of representation by his counsel at the state court proceedings. For this reason too, he is precluded from urging these contentions on this appeal. Schiers v. California, 333 F.2d 173 (9th Cir. 1964); Rose v. Dickson, 327 F.2d 27 (1964).

Appellant's additional allegations that he was "brow beaten," "inflicted with brutality" and coerced by the possibility of the death sentence itself have already been resolved against him by this Court. Gilmore v. California, 364 F.2d 916 (9th Cir. 1966).

CONCLUSION


For the foregoing reasons, appellee submits that the order of the District Court should be affirmed

and the proceedings herein dismissed.

Dated: April 5, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Michael Buzzell". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Buzzell".

MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Appellee

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: April 5, 1968.

A handwritten signature in dark ink, reading "Michael Buzzell", written in a cursive style.

MICHAEL BUZZELL
Deputy Attorney General

